No. 92-42

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1991

STATE OF OHIO,
Petitioner,

vs.

HENRY BROWN,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is the state entitled to review of an unduly restrictive interpretation of the Fourth Amendment by the Ohio Supreme Court refusing to follow the authority of *New York v. Belton*, 453 U.S. 454 (1981)?

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No. _____

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The Opinion and Judgment of the Supreme Court of Ohio appears in the appendix, as do the Decision and Journal Entry of the Court of Appeals Ninth Judicial District, Ohio; and the Journal Entry of the Court of Common Pleas, Medina County, Ohio.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered April 8, 1992. The Petitioner did not seek rehearing. This Petition for Writ of Certiorari has been filed within ninety days of the April 8, 1992 judgment. This Court has jurisdiction to grant this Petition under 28 U.S.C. Section 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional issues in this case arise under the Fourth Amendment of the United States Constitution and the decisions of this Court in construing its proscriptions and exceptions.

The Fourth Amendment:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Respondent Henry Brown was indicted on October 10, 1989, for one count of drug abuse, possession of LSD. The charge arose from an incident which occurred on May 9, 1989, when Brown was arrested for driving under the influence of alcohol and driving under suspension.

A motion to suppress evidence was filed by Brown and a hearing held on February 5, 1990. At the motion to suppress hearing, Sgt. Meding of the Brunswick Police Department testified that on May 9, 1989, he was on routine patrol on State Route 303 in the City of Brunswick. It was stipulated that Brown had been driving a car and was taken into custody by a valid arrest. Incidental to his arrest, Brown's vehicle was searched and then towed from the scene. Sgt. Meding indicated that he searched the interior portions of the automobile, including the glove box. Inside that glove box he found an unlocked brown wooden box which contained seven LSD sugar cubes.

On cross-exam, it was adduced that the box was not in plain view, that Brown was in custody in the police car at the time of the search, and that the vehicle was not searched pursuant to an inventory.

The prosecution argued that the search of the vehicle compartment was justified as a search incidental to arrest. Brown contended that the search should have been made as an inventory and that the officer lacked probable cause to search the car. With leave of court, the State of Ohio filed a brief in opposition and Brown filed his response.

On March 20, 1990, the trial court made its findings and order granting the motion to suppress. The state timely appealed pursuant to Ohio Crim. R. 12(J).

The sole assignment of error raised by the state was briefed and argued in the state court of appeals. Respondent did not file a brief and waived oral argument. In an opinion dated November 28, 1990, the court of appeals affirmed the decision of the trial court by a 2-1 decision. *State v. Brown* (Nov. 28, 1990), Medina App. No. 1895.

A timely notice of appeal was filed in the court of appeals from that decision. On January 8, 1991, the State of Ohio filed a memorandum in support of jurisdiction claiming an appeal as of right involving a constitutional question for which the Ohio Supreme Court has appellate jurisdiction. The case was accepted by this state's highest court on June 12, 1991, and the record submitted and filed. Briefs were filed by the petitioner and respondent, as well as an amicus brief filed by the Ohio Public Defender.

The case was argued in the Supreme Court of Ohio on January 21, 1992. In its April 8, 1992 decision, the court held that a police officer may not open a small, closed container found inside a vehicle's glove box solely as a search incident to the driver's arrest after that driver is under control in the police car.

The petitioner now requests the Supreme Court of the United States to review the decision of the Ohio Supreme Court and reverse on the grounds that the search incident to arrest fully comports with the Fourth Amendment and its exceptions.

REASONS FOR GRANTING THE WRIT

A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment which justifies a search incidental to arrest. That search may extend to the passenger compartment of the arrestee's vehicle and any containers found therein. In *New York v. Belton*, 453 U.S. 454 (1981), this Court held that a police officer who has made a valid custodial arrest of the occupant of a vehicle may, as a contemporaneous incident of that arrest, search the passenger compartment of the vehicle and examine the contents of any containers found within that compartment. "Container" was defined to include any object capable of holding another object including *closed* or opened glove compartments, consoles, other receptacles as well as luggage, *boxes*, bags, clothing and the like. *Id.*, at 460, footnote 4.

In the instant case, the state courts attempted to distinguish *Belton* on the premise that Sgt. Meding did not have probable cause or anything to arouse his suspicion that the vehicle contained any contraband. The trial court emphasized that in *Belton* the officer smelled marijuana smoke, where this case only involved a DUI arrest.

However, it was the smell of marijuana smoke and the trooper's observations in *Belton* which provided the basis for the custodial arrest (for possession of marijuana). A search of the vehicle's interior compartment incident to that arrest revealed cocaine in the pocket of a jacket belonging to Belton. If the *Belton* case followed the rationale that has been followed in this case, the cocaine would have to be suppressed because a

suspect arrested for possession of *marijuana* provides no probable cause or anything to arouse an officer's suspicion that the vehicle contains *cocaine*.

But it was not the fact that an arrest for marijuana possession provided justification for the search in *Belton*, but that a *custodial* arrest had occurred. "The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. *A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment: that intrusion being lawful, a search incident to the arrest requires no additional justification.*" *Belton*, at 461, citing *United States v. Robinson*, 414 U.S. 218, 235 (1973).

The Ohio Court of Appeals cited the "fundamental principles" of *Chimel v. California*, 395 U.S. 752, 763 (1969), to erroneously restrict the "relatively narrow compass of the passenger compartment of an automobile" which the *Belton* case expressly permits to be searched as a contemporaneous incident to a custodial arrest. Articles within that automobile are in fact generally, *even if not inevitably*, within the area into which an arrestee might reach in order to grab a weapon or evidentiary item. *Belton*, at 460. The essential question is whether the article was within an area which "*was* within the arrestee's immediate control." *Belton*, at 462, emphasis added.

The Ohio Supreme Court has repeatedly followed the constitutional guidelines set by this Court in cases interpreting the Fourth Amendment. *Ohio v. Welch*, 18 Ohio St. 3d 88 (1985), following *United States v. Ross*,

456 U.S. 798 (1982); *Ohio v. Wilmoth*, 22 Ohio St. 3d 251 (1986), following *United States v. Leon*, 468 U.S. 897 (1984); *Ohio v. George*, 45 Ohio St. 3d 325 (1989), following *Illinois v. Gates*, 462 U.S. 213 (1983). Despite that history, the holding of the Ohio Supreme Court in this case is based upon an unduly restrictive interpretation of the Fourth Amendment.

In *California v. Acevedo*, 500 U.S. _____, 111 S. Ct. 1982 (1991), this Court stated that "under *Belton*, the same probable cause to believe that a container holds drugs will allow the police to arrest the person transporting the container and search it." *Id.*, at _____. This language has caused the Ohio Supreme Court to blur the distinction between searching a vehicle based on probable cause (*Ross*) and searching a vehicle incident to the custodial arrest of the occupant (*Belton*). But it is important to reiterate that the search here was justified because a *custodial* arrest occurred. There is no question that a police officer would not be entitled to conduct a search of an automobile merely because the driver is stopped for a traffic violation and a traffic citation is issued.

In *United States v. Turner*, 59 U.S.L.W. 2548 (9th Cir. 1991), the court held that a warrantless search may be upheld under the Fourth Amendment as incident to arrest of a person who is no longer present 1) if the area searched *was* within the person's immediate control at the time of arrest, and 2) if nothing happened between arrest and search to make the search unreasonable.

A search of a vehicle compartment satisfies the two-step inquiry used by the *Turner* court. First, the passenger compartment is within the area contemplated by *Chimel* where an arrestee might gain possession of a weapon or destructible evidence. Second, the circumstances of a custodial arrest of a vehicle's occupant makes it implausible and unlikely that a police officer would allow the arrestee to remain in the vehicle while the officer conducts his search. An officer acts reasonably and out of a concern for safety if the search is delayed until the arrestee is removed from the area (or in this case, the vehicle) from which he was found.

In *United States v. White*, 871 F.2d 41 (6th Cir. 1989), the Sixth Circuit held that the search of a vehicle's interior compartment incident to arrest was valid even though the arrestee was handcuffed and placed in the back seat of a police cruiser. Apparently, this rationale holds true in the Seventh, Eighth, Tenth, and now, Ninth Circuits. *Cf., United States v. Vasey*, 834 F.2d 782 (9th Cir. 1987).

This Court has long recognized that the police need clear, unequivocal guidelines which do not get pushed, pulled, or forced into being called an "inventory" search or a "probable cause" search when the facts do not support that particular exception. The police need to know if they arrest a suspect and take him into custody, they can search the vehicle the arrestee came out of as a contemporaneous incident of that arrest. *See Belton*, at 458, quoting *Dunaway v. New York*, 442 U.S. 200, 213-214 (1979). The decision of the Ohio Supreme Court in this case is the antithesis of a clear and unequivocal guideline that will severely impede effective law enforcement throughout the State of Ohio. *United States v. Place*, 462 U.S. 696 (1983).

CONCLUSION

The Court should grant this Petition for Writ of Certiorari and hold that the search incident to arrest extends to the passenger compartment of the arrestee's vehicle and any containers found therein even when the arrestee is no longer in the vehicle.

Respectfully submitted,

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APPENDIX

JUDGMENT ENTRY OF THE SUPREME COURT OF OHIO

(Dated April 8, 1992)

Case No. 91-34

THE SUPREME COURT OF OHIO

STATE OF OHIO,
Appellant,

v.

HENRY BROWN,
Appellee.

APPEAL FROM THE COURT OF APPEALS

JUDGMENT ENTRY

This cause, here on appeal from the Court of Appeals for Medina County, was considered in the manner prescribed by law. On consideration thereof, the judgment of the court of appeals is affirmed consistent with the opinion rendered herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; and that a mandate be sent to the Court of Common Pleas for Medina County to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Medina County for entry.

(Court of Appeals No. 1895)

/s/ THOMAS J. MOYER
Chief Justice

MANDATE OF THE SUPREME COURT OF OHIO

(Dated April 8, 1992)

Case No. 91-34

THE SUPREME COURT OF OHIO

STATE OF OHIO,
Appellant,

v.

HENRY BROWN,
Appellee.

MANDATE

To the Honorable Court of Common Pleas

Within and for the County of Medina, Ohio.

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Judgment of the court of appeals is affirmed consistent with the opinion rendered herein.

COSTS:

Motion Fee, $40.00, paid by Dean Holman.

(Court of Appeals No. 1895)

/s/ THOMAS J. MOYER
Chief Justice

OPINION OF THE SUPREME COURT OF OHIO

(Dated April 8, 1992)

Case No. 91-34

THE SUPREME COURT OF OHIO

STATE OF OHIO,
Appellant,

vs.

HENRY BROWN,
Appellee.

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[349] [Cite as *State v. Brown* (1992), 63 Ohio St.3d 349.]

Criminal law—Search and seizure—Police officer may not open a small, closed container found inside an automobile's glove compartment solely as a search incident to the driver's arrest for a traffic violation after officer has suspect under control in the police cruiser.

A police officer may not open a small, closed container found inside an automobile's glove compartment solely as a search incident to the driver's arrest for a traffic violation, after the officer has the suspect—and sole occupant of the vehicle—under control in the police cruiser. (*New York v. Belton* [1981], 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768, distinguished; the Fourth Amendment to the United States Constitution and Article I, Section 14 of the Ohio Constitution, applied.)

APPEAL from the Court of Appeals for Medina County, No. 1895.

On May 9, 1989, Sergeant Carl Meding arrested Henry Brown (defendant-appellee) for driving under the influence of alcohol. Brown concedes that the arrest was valid. After Meding arrested Brown and placed him in custody in the patrol car, Meding searched the passenger compartment of Brown's automobile. During the course of this search, Meding opened an unlocked brown wooden box that he found in the glove compartment of the car. The box contained seven sugar cubes, which were laced with lysergic acid diethylamide ("LSD").

Brown was the only person in his automobile, and Meding testified that he did not see any drug paraphernalia or other evidence of drug use in the car prior to his search. The car was towed from the scene and was never subjected to an inventory search.

Brown was indicted for one count of drug abuse for possession of LSD on October 10, 1989. Defendant counsel filed a motion to suppress the LSD found in the sugar cubes because the evidence was obtained during an unconstitutional search. The Medina County Court of Common Pleas granted the motion on March 20, 1990. The court held that the officer was permitted to search the vehicle incident to Brown's arrest, but that he exceeded the proper scope of that search when he opened the closed container without probable cause. The court of appeals affirmed.

[350] This cause is now before the court pursuant to the allowance of a motion for leave to appeal.

Dean Holman, Prosecuting Attorney, and *John J. Dolatowski*, for appellant.

L. Ray Jones, for appellee.

Randall M. Dana, Ohio Public Defender, and *Robert L. Lane*, urging affirmance for *amicus curiae*, Ohio Public Defender Commission.

WRIGHT, J. This case requires us to define the proper scope of a search of an automobile incident to the driver's arrest for driving under the influence of alcohol. The state urges us to reverse the lower courts on the basis of *New York v. Belton* (1981), 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768. We decline to do so. An arrest for a traffic violation does not *automatically* entitle an officer to conduct a detailed search of the arrestee's automobile.

The Fourth Amendment to the United States Constitution and Section 14, Article I of the Ohio Constitution require the police to obtain a warrant based on probable cause before they conduct a search.[1] However, the warrant requirement is subject to a

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[1] The Fourth Amendment to the United States Constitution provides that:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Section 14, Article I of the Ohio Constitution provides that:

"The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the person and things to be seized."

number of well-established exceptions. See, *e.g.*, *Carroll v. United States* (1925), 267 U.S. 132, 45 S. Ct. 280, 69 L. Ed. 543 (police may search an automobile without a warrant when they have probable cause to suspect that the automobile contains contraband); *South Dakota v. Opperman* (1976), 428 U.S. 364, 96 S. Ct. 3092, 49 L. Ed. 2d 1000 (police may search an automobile without a warrant to inventory its contents); *Texas v. Brown* (1983), 460 U.S. 730, 103 S. Ct. 1535, 75 L. Ed. 2d 502 (police may search suspicious items in plain view in an automobile). The sole issue in this case is whether the warrantless search of Brown's automobile was justified under the line of cases that permit an officer to conduct a warrantless search incident to a lawful custodial arrest, in order to protect himself from any accessible weapons.[2] See *Chimel v. California* (1969), 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685; *New York v. Belton*, *supra*.

The scope of a search incident to arrest was first defined in *Chimel v. California*, *supra*. "When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. ***

---

[2] The sole proposition of law in the state's brief reads as follows:

"A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment which justifies a search incidental to arrest. That search may extend to the passenger compartment of the arrestee's vehicle and any containers found therein."

None of the other exceptions to the warrant requirement is applicable. Sergeant Meding admitted that he did not see or otherwise detect any evidence that made him believe that the car contained drugs or other contraband. He also testified that the car was never subjected to an inventory search.

A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area 'within his immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." *Id.* at 762-768, 89 S. Ct. at 2040, 23 L. Ed. 2d at 694.

In *New York v. Belton*, the United States Supreme Court applied *Chimel* to the search of an automobile incident to the arrest of one of its occupants. In *Belton*, a police officer pulled a car over for speeding. *New York v. Belton, supra*, 453 U.S. at 455, 101 S. Ct. at 2861, 69 L. Ed. 2d at 772. While addressing the four men in the car, the officer smelled marijuana and saw an envelope marked "Supergold" that he associated with marijuana. He then ordered all four men out of the car and placed them under arrest for the unlawful possession of marijuana. The officer arrested them, patted them down, and had them stand near the expressway while he searched the car. As part of that search, the officer opened a zippered pocket in a jacket located on the back seat of the car and discovered cocaine. *Id.* at 455-456, 101 S. Ct. at 2861-2862, 69 L. Ed. 2d at 772. The United States Supreme Court upheld the validity of the search. *Id.* at 462, 101 S. Ct. at 2865, 69 L. Ed. 2d at 776.

The facts of this case are clearly distinguishable from *New York v. Belton*. In that case, the officer had arrested Belton and his companions for *possession of marijuana* prior to his search. The arrests were based on the officer's observation of an envelope that was in plain view and the odor of burning marijuana. These facts provided the officer with both probable cause to arrest

the occupants for possession of marijuana and probable cause to [352] search the vehicle for additional marijuana or evidence of marijuana use. See *California v. Acevedo* (1991), 500 U.S. _____, _____, 111 S. Ct. 1982, 1989, 114 L. Ed. 2d 619, 631 (discussing *New York v. Belton*). Because the search was reasonable based on probable cause, any evidence that the officer discovered while acting within the proper scope of that search was admissible, even if not related to the original charge.

We distinguish *New York v. Belton* from this case on its facts. A court should never " '*** formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' " *United States v. Raines* (1960), 362 U.S. 17, 21, 80 S. Ct. 519, 522, 4 L. Ed. 2d 524, 529, citing *Liverpool, N.Y. & Phil. S.S. Co. v. Commrs. of Emigration* (1895), 113 U.S. 33, 39, 5 S. Ct. 352, 355, 28 L. Ed. 899, 901. In the case currently before this court, Brown was arrested for driving under the influence of alcohol, and Meding admits that he had no probable cause or other independent justification for searching the vehicle.

If *Belton* does stand for the proposition that a police officer may conduct a detailed search of an automobile *solely* because he has arrested one of its occupants, *on any charge*, we decline to adopt its rule.[3] As Justice Stevens pointed out, this rule permits an extensive search based on facts that could never support a warrant because of the lack of probable cause. *Robbins v. California* (1981), 453 U.S. 420, 452, 101 S. Ct. 2841, 2859, 69 L. Ed. 2d 744, 767 (Stevens, J., dissenting, in

[3] As the United States Supreme Court stated in *California v. Greenwood* (1988), 486 U.S. 35, 43, 108 S. Ct. 1625, 1630, 100 L. Ed. 2d 30, 39: "Individual States may surely construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal Constitution."

companion case to *New York v. Belton, supra*). We do not believe that the certainty generated by a bright-line test justifies a rule that automatically allows police officers to search every nook and cranny of an automobile just because the driver is arrested for a traffic violation.

We hold that the warrantless search of Brown's automobile was unreasonable and violated the Fourth Amendment to the United States Constitution and Section 14, Article I of the Ohio Constitution. The item was not in plain view, Meding did not have probable cause to believe that the car contained drugs prior to his search, and the contents of the automobile were never inventoried. The only possible justification for this search is that the officer was searching for weapons or other evidence within the immediate control of the suspect, as defined by *Chimel v. California, supra.*

When Meding searched Brown's automobile, Brown had already been placed in the police cruiser, and was not resisting arrest. A back-up officer had arrived at the scene. Brown would have had no opportunity to obtain a [353] weapon or anything else from his car at this point. The contents of the automobile were no longer within the arrestee's immediate control, and consequently the officer was certainly not justified in opening a small container found in the glove compartment. See *Chimel v. California, supra*; 3 LaFave, Search and Seizure (2 Ed.1987) 7, Section 7.1(b) (the application of *Chimel* to an automobile search depends in part on [1] the position of the defendant and the officer in relation to the vehicle, and [2] the ease with which the defendant could obtain access to the vehicle or container). A police officer may not open a small, closed container found inside an automobile's glove compartment *solely* as a search

incident to the driver's arrest for a traffic violation, after the officer has the suspect—and sole occupant of the vehicle—under control in the police cruiser.

The judgment of the court of appeals is affirmed.

Judgment affirmed.

MOYER, *C.J.*, SWEENEY, HOLMES, DOUGLAS, H. BROWN and RESNICK, *JJ.*, concur.

DECISION AND JOURNAL ENTRY OF THE COURT OF APPEALS OF OHIO, NINTH JUDICIAL DISTRICT

(Dated November 28, 1990)

C.A. No. 1895

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO,
Plaintiff-Appellant,

v.

HENRY BROWN,
Defendant-Appellee.

APPEAL FROM JUDGMENT ENTERED IN THE COMMON PLEAS COURT COUNTY OF MEDINA, OHIO
CASE NO. 89 CR 0308

DECISION AND JOURNAL ENTRY

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

CIRIGLIANO, *J.* On May 9, 1989, defendant-appellee, Henry Brown was arrested for driving under the influence of alcohol and driving an automobile with a suspended license. After the defendant was arrested, handcuffed and seated in a police vehicle, the officer

conducted a search of the defendant's automobile. The officer found a wooden box in the glove compartment of the automobile. The box contained a plastic bag with seven sugar cubes. A subsequent lab analysis found the sugar cubes to contain lysergic acid diethylamide (LSD).

Brown was indicted for one count of drug abuse. The trial court conducted a suppression hearing and granted the defendant's motion to suppress the evidence seized in the automobile search conducted at the time of Brown's arrest for driving under the influence of alcohol.

The State appeals the trial court's order granting the motion to suppress, raising one assignment of error. We affirm.

Assignment of Error

> "The trial court erred in granting defendant's motion to suppress evidence which was seized pursuant to a search incidental to the custodial arrest of the defendant."

Following a suppression hearing, the trial court found that the search of the defendant's car was incidental to a lawful arrest for driving while under the influence of alcohol. However, in determining that the search was not an inventory search or one conducted with the defendant's consent, or other warrantless search exceptions, the trial court distinguished the cause *sub judice* from the case of *New York v. Belton* (1981), 453 U.S. 454. The trial court found that there was no probable cause to justify the opening of the closed containers found in the defendant's automobile interior, unlike the situation in *Belton, supra,* where the officer's detection of marijuana smoke eminating from the automobile constituted probable cause for a search of the defendant's jacket which was found on the rear seat of the vehicle.

The State argues that the trial court improperly granted defendant's suppression motion since a search incident to a custodial arrest, based on probable cause, is a reasonable intrusion under the Fourth and Fourteenth Amendments as found in *New York v. Belton, supra.*

It has been held that in order for a warrantless search of an automobile to be constitutionally justifiable as incident to an arrest, the arrest itself must be valid, *Whiteley v. Warden, Wyoming State Penitentiary* (1971), 401 U.S. 560, 568-69; the search must occur at a place and time which is not remote from the place or time of the arrest, *Cardwell v. Lewis* (1974), 417 U.S. 583; *Preston v. United States* (1964), 376 U.S. 364; and, the extent of the search must be confined to an area within the arrestee's immediate control, *Chimel v. California* (1969), 395 U.S. 752.

In *Belton, supra,* the court held that when a police officer has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile. *Id.* at 460. However, in upholding the search of the defendant's jacket which was inside the passenger compartment, the Court emphasized that the *Belton* decision did not alter the principles of *Chimel, supra,* regarding the basic scope of searches incident to a lawful arrest. *Belton, supra,* at 460.

To suppress evidence obtained pursuant to a warrantless search or seizure, the defendant must demonstrate the lack of a warrant, and raise the grounds upon which the validity of the search or seizure is challenged in such a manner as to give the prosecutor notice of the basis for the challenge. *Xenia v. Wallace* (1988), 37 Ohio St. 3d 216, 219. Once a defendant has demonstrated a warrantless search or seizure and

adequately clarified that the grounds on which he challenges its legality is lack of probable cause, the prosecutor bears the burden of proof on the issue of whether probable cause existed for the search or seizure. *Id.* at 220.

We find that the trial court correctly determined that there was no probable cause to conduct an extensive search of the car's interior when the defendant had no immediate control over the auto or its contents since he was handcuffed and seated in the police car. Further, there was nothing to arouse the officer's suspicion that a weapon was present or, was there the possibility of the destruction of evidence. As a factual question, probable cause is best determined by the trier of fact who had the opportunity to hear the testimony and observe the witnesses. *Beck v. Ohio* (1964), 379 U.S. 87. We should not substitute our judgment for that of the trial court's when they are in a better position to judge such matters.

Therefore, the assignment of error is overruled and the judgment of the trial court is affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this court, directing the County of Medina Common Pleas Court to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App. R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App. R. 22(E).

Costs taxed to appellant.

Exceptions.

/s/ JOSEPH E. CIRIGLIANO
For the Court

CACIOPPO, *P. J.*
concurs

MAHONEY, *J.*
dissents saying:

I dissent. I believe this case falls within the purview of *New York v. Belton, supra*, and as followed by our Sixth Circuit in *U.S. v. White* (C.A. 6, 1989), 871 F. 2d 41.

(Mahoney, *J.*, retired Judge of the Ninth District Court of Appeals, sitting by assignment pursuant to Article IV, Section 6(C), Constitution).

FINDINGS AND ORDER OF THE COURT OF COMMON PLEAS MEDINA COUNTY, OHIO

(Filed March 20, 1990)

Case No. 9694

IN THE COURT OF COMMON PLEAS

MEDINA COUNTY, OHIO

STATE OF OHIO,
Plaintiff,

v.

HENRY BROWN,
Defendant.

FINDINGS and ORDER

1. Defendant has filed a motion to suppress evidence seized by a Brunswick Police Officer after Defendant had been arrested for DUI and placed in a police cruiser.

A tow truck was called to tow Defendant's car.

2. The Police Officer searched the Defendant's car and found in the unlocked glove compartment, a box. He opened the box and found fifteen (15) sugar cubes which, after testing, showed LSD present.

3. The search was not, by the Officer's admission, an inventory of the contents of the car, nor was it a search pursuant to the consent of the Defendant. The box seized was not in plain view.

4. It was a search incidental to a lawful arrest since the Defendant had been arrested for DUI.

5. The problem with this search was that there was no probable cause shown for the Officer to believe that the vehicle contained any contraband.

There was nothing in plain sight. There was nothing to arouse his suspicion that he had anything other than a possible DUI arrest as opposed to the *Belton* case where the Officer smelled marijuana smoke.

6. A search of the vehicle was permissible, but not any closed containers.

ACCORDINGLY, the motion to suppress IS GRANTED.

IT IS SO ORDERED.

/s/ PHILLIP A. BAIRD
Presiding Judge